SUPREME COURT, U. S.

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No. 260

In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

I. M. AMUSEMENT CORP.,

Appellant,

v.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT IN SUPPORT OF NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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Appellant prays that an Appeal be granted from the judgment of the Supreme Court of Ohio entered on February 15, 1967, which denied appeal as of right from the Court of Appeals for Hamilton County, Ohio (First Appellate District of Ohio) for the reason that no substantial constitutional question exists therein, and affirmed Petitioner's conviction for exhibiting an obscene motion picture. Notice of Appeal to the Supreme Court of the United States was filed in both the Supreme Court of Ohio and the Court of Appeals, First Appellate District of Ohio, on May 13, 1967. Said decision affirmed the Constitutionality under the 1st and 14th Amendments to the Constitution of the United States of Ohio Revised Code, Section 2905.34.

OPINIONS BELOW

The opinion of the Court of Appeals of the First Appellate District, Hamilton County, Ohio is reported at 10 Ohio App. 2d 153, and printed herein as Appendix A.

The judgment entry of the Supreme Court of Ohio is printed herein as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 and 2101, and Parts IV and V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional questions to be presented by this Appeal, all of which were presented to the trial court except for Question Five which first arose as a question of constitutional magnitude on the appeal from the Court of Appeals to the Supreme Court of Ohio, as shall hereinafter be more fully indicated, and all of which were argued on appeal to the Supreme Court of Ohio and raised at the earliest instance possible in this entire cause are as follows:

(1) Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and falling within the contemporary community standard as not appealing to prurient interest?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on

any alleged obscene aspect of the motion picture in question or pandering by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity, charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

(4) Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States? (O.R.C. § 2905.34 and § 2905.371 appear in Appendix C hereof).

(5) On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On June 12, 1963, a police officer of the City of Cincinnati, Ohio accompanied by an officer of a group known as Citizens for Decent Literature and Motion Pictures as paid admittees viewed a portion of a film, referred to in the later indictment as "Artist's Models", and a feature movie at the *Imperial Theatre* in that city. The police officer returned the next day to said theatre, once again paying the price of admission. He again observed the self-same portion of the film in question in this cause and thereupon confiscated the same, and cited the corporate defendant for violation of O.R.C. § 2905.34 (Obscenity statute). (R. 4-20)

A motion to dismiss was filed against the subsequent indictment on several grounds, including the unconstitutionality, under the First Amendment to the United States Constitution, of Ohio's obscenity statute O.R.C. § 2905.34 as defined by O.R.C. § 2905.371, and the privileged nature of the charged film. Said motion was overruled without a viewing of the film. On coming on for trial a jury was waived. The State offered no evidence as to the obscenity of

the film, its patent offensiveness, its departure from community standards, or its lack of redeeming social importance. The police officer who seized the film testified *solely* to the facts set forth in the first paragraph of this Statement of Facts. He made no mention of any alleged manager of the theatre or any conversation or dealings, if any, with such a person, or any other corporate agent. (R. 4-20) The film was introduced into evidence and shown in the courtroom for the officer's identification. It consisted of a series of shots of partially nude female models, making no particularly suggestive motions or actions, and some dances commonly known as the strip tease or belly dance. The officer admitted on cross-examination that only about the first half of the same had been shown on the two days in question. The film was silent, but the Court barred questioning on cross-examination that in the showing of it at the theatre a non-inflammatory musical background was provided. (R. 15) The film, as introduced and exhibited in court, bore no title, but was called in the indictment "Artist's Models". (R. 20-21) It was stipulated that there was an existing de jure and de facto corporation known as I. M. Amusement Corporation under the laws of the State of Ohio, but no other evidence of any acts of said corporation was offered. (The Defense never raised the question of variance of name between indictment and corporate charter.) The State then offered evidence that a William Berger signing as an officer of the I. M. Amusement Corporation inserted an advertisement in the Cincinnati Post-Times Star for June 11, 12 and 13 announcing the billing for the Imperial Theatre. A copy of this advertisement referring to a feature picture (not contended by the State to be the picture in question) and a short subject called "Beauteause Models" was introduced into evidence. (Exhibit 2) No evidence was offered to explain the discrepancy or indicate "Beau-

tease Models" was the picture in question. The State then rested. Motion was then made for dismissal, which the Court took under submission, asking for memorandum.

The defendant submitted a memorandum in which state and federal constitutional questions re the lack of obscenity of the film in question, the lack of any state adduced proof of obscenity, the inadequacy of proof of scienter and/or purpose to disseminate as obscene, especially of a corporate entity, as well as constitutional arguments previously advanced in pre-trial motions were advanced.

An additional due process grounds, to-wit, failure of the prosecution to prove the witting offering of the picture in question or adequately any act whatsoever of the defendant, I. M. Amusement Corporation, was also urged. After a passage of approximately two weeks, the prosecution asked and was granted leave to re-open its case. (R. 34) At this time the prosecution introduced evidence that a license had been issued generally to the I. M. Amusement Corporation for the operation of the Imperial Theatre as a motion picture theatre for a fiscal year encompassing June 12 and 13, 1963. (R. 34-42) (No evidence was submitted of the licensing of the film in question, nor is any such required by the ordinances of the City of Cincinnati or the statutes of the State of Ohio. It is assumed that language to the contrary in the third paragraph of the opinion of Hover, J. of the Court of Appeals, First Appellate District of Ohio, reprinted as Appendix A, is a mere inadvertent misstatement of fact.) The State once again rested, and the Court thereupon forthwith denied the motion for dismissal with no comment on any of the multiple constitutional grounds offered in support of said motion. (R. 44) The defense, reserving its exceptions, then offered as a witness the head of Cincinnati's Civic Theatre, The Playhouse in the Park. This witness testi-

fied to his background as follows: He has had post graduate training in the theatrical and cinematographic arts, had written his thesis on theatrical and cinema psychological impact and communal acceptance, and had seven years practical experience in theatrical and movie presentation and production in Princeton, New Jersey, New York, New York, and Cincinnati, Ohio. The Court refused to hear further testimony from this witness that the depictions of the picture in question did not affront existing and widespread contemporary community standards relating to the depiction or representation of the semi-draped female form; that the picture depioted only strip-tease, burlesque dancing, or female tableaux which are accepted theatrical and night club movie conventions of many years standing in both the local and national community, such convention being so established as to have achieved redeeming social value as entertainment. (R. 47-56) The defense then rested. No rebuttal was offered by the State. The Court forthwith returned a verdict of guilty. (Appendix E) . This appeal was carried forward to the Court of Appeals, which after argument rendered the opinion set forth in Appendix B.

Appeal was carried from the Court of Appeals to the Supreme Court of Ohio both as of right and on leave to certify the record. *Without certification of the record and without any possible inspection of the charged film, which reposed with the Court of Appeals pending admission to the Supreme Court of Ohio,* the Supreme Court of Ohio dismissed the appeal sua sponte for the reason that no substantial constitutional question exists. (Appendix A) Appellant argued among other constitutional arguments heretofore indicated both by brief and orally before the Supreme Court of Ohio, that the film in question was not and could not be considered as a matter of both law and fact prohibitable or punishable obscenity.

REASONS FOR ISSUING THE WRIT

INTRODUCTORY

This cause should be reversed and remanded on the authority of *State of Ohio* v. *Jacobellis*, 378 U.S. 184. In that case Ohio eagerly found the movie "The Lovers" obscene. When the case reached the Supreme Court, Justice Brennan said ". . . We have reviewed the film in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enumerated in *Roth* v. *United States* and *Albert* v. *California*". Ohio has now ignored stare decisis not only by perfunctorily affirming a conviction on a movie that is not patently offensive, does not depict total nudity or reveal genitalia, or even suggest the sexual act without even looking at the film, but indeed approves, a procedure in which the State offered *no evidence whatsoever* of deviation below the community standard, or of any act upon the part of the defendant even hinting guilty knowledge or pandering intent and the Court refused defense adduced evidence of the contrary. Indeed, hardly chastened by *Jacobellis*, the Supreme Court of Ohio even finds no substantial debatable constitutional question. Ohio elevates the presence of any sexuality, or to be charitable even a dominant theme of sexuality in the matter presented to a doctrine of prima facie proof of all the elements of the crime of disseminating obscenity. Indeed the inference of allowance of prima facie proof is inadequate. The Supreme Court of Ohio found no debatable constitutional question when the lower court refused testimony on the contemporary community standard on the part of the defense. We are indeed dealing with not merely prima facie proof but apparently an irrefutable presumption. Ohio has revenged its reversal in *Jacobellis* by enlarging Roth, which put obscenity beyond

the pale of the protection of the First Amendment by creating a doctrine that if the dominant theme is female sexual attractiveness the matter and its disseminator are apparently beyond the protection of all constitutional safeguards.

Question One. Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and following within the contemporary community standard as not appealing to prurient interests?

It has recently been made once again evident in *Robert Redrup* v. *State of New York,* 384 U.S. 916, and companion cases decided May 9, 1967 by this court, that a wide and disturbing variance exists between the constitutional boundaries of both the defindory limits and means of adjudicating obscenity as enunciated by this Court, and as applied by some state courts, particularly Ohio. (See *Ohio* v. *Jacobellis,* 378 U.S. 184, *Ohio* v. *Mapp,* 170 O.S. 427, *Ohio* v. *Mapp,* 367 U.S. 643, *State of Ohio* v. *Mazes,* 7 O.S. 2d 136, reversed No. 896 Supreme Court of the United States, Oct. Term 1966.) Yet Ohio, like many other states, persists in enlarging the severely limited exception to full expression, labeled obscenity, to an almost total possibility of obliteration of sexuality as a subject of free expression. If the matter contains indication of a sexual interest the prosecution becomes a res ipse loquitor matter with almost total exemption of the prosecution from all the normal attributes of proving a wilful crime. The possibility of a prurient reaction becomes the entire sustenance of a state's case.

Counsel has carefully seen to it that the entire reel of the film in question in this case has been forwarded to the Court for its inspection. In view of the *Redrup* deci-

sion the Court is requested to have its most naive clerk inspect the same. It is so blandly commonplace that it is almost an absurdity that we are, at this juncture, in this century involved in a charge at all. The picture is a harmless collection of pinups less revealing or suggestive than those depicted in the periodicals considered in *Gent, et al* v. *The State of Arkansas,* 384 U.S. 937 or *Austin* v. *Kentucky,* 384 U.S. 916. Nowhere in the picture is the entirely unconcealed female form shown. There is no mixing of sexes. No hectic or erotic dances are presented unless the common places of the burlesque theatre long accepted, even forty years ago in the dicta of late Justice Holmes, have after all these years suddenly become, in an exercise of pious hypocrisy, beyond the realm of widespread acceptance. There is no simulation, symbolizing, or pantomining of sexual acts. One scene was described by the trial court as follows:

> "Two women, at least nude to the waist, going through actions which lead to no conclusion in my opinion except that they were behaving like lesbians." (Appendix C)

The scene depicts nothing except two partially draped females posing who have no contact or conversation with one another, except at one point for about two seconds duration one playfully pretends to tickle the other on the *nose* with a feather. Honi soit qui mal y pense has been reversed to a point of polishing off the First Amendment in Ohio. The picture does not even show total nudity, but only a form of dance and pose so long tolerated in the national community and indeed even in the local community in which this case was tried, as to have established redeeming social importance as a mode of light entertainment.

The Court is not even faced in this matter with determining whether applying the contemporary community standards in the description or representation of sexual matters affords a reference to consensus, majority point of view, significant minority or the outer limits of toleration, a difficult issue yet to be specifically enunciated, although the inference from decisions and the logic of freedom of expression indicate the last concept already applies. The problem is not reached for the depictions of this picture are so commonplace in the light of the history of the burlesque or follies theatre in this country, the night club act, go-go girls, barracks pin-ups, and similar matters that the problem is not even posed. The State offered not a scintilla of extrinsic or relative evidence that the movie was below the community standard, nor of any other element of obscenity. Nor did the State offer any evidence whatsoever that the defendant in any way engaged in pandering in showing the picture, the trial court even barring evidence of the contrary.

Question Two. Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on any alleged obscene aspect of the motion picture in question or pandering of the picture by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

In *Friedman* v. *Maryland*, 85 S. Ct. 784, 380 U.S. 51,

this Court states "First the burden of proving that the film was unprotected expression must rest on the censor". This was stated in relation to a civil matter, not the more sensitive criminal proceeding involved herein. What happened in this case was that the prosecutor merely identified the seized movie and rested. From then on it became a defensive burden to prove it was protected utterance. An approved prosecutory procedure of proof which purports to dispense with any requirements of the adduction of evidence establishing the essential relativity which is implied in the various elements of the definition of obscenity ultimately results in the immediate imposition of unconstitutional limitations on the publics access to constitutionally protected matter. *Speiser* v. *Randall*, 357 U.S. 513, 525; *Smith* v. *California*, 361 U.S. 147; *Marcus* v. *Search Warrants of Property*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205. A depiction, isolated unto itself, gives no information as to what are the limits of candor in the nation as a whole, nor in a viable, exploratory, intellectual, searching society in which at every moment there is a fresh and bold adventure of ideas and the modes of expressing them, both in every area of essential interest to humanity including that large, intense and important area of mans interest, his own sexuality, and in variant medias each uniquely different and not necessarily known to all persons, to leave to the laws of chance and the infinite subjectivity of any particular trier of fact whether any given exploration is within the realm of this moment's community standard is prejudicial to the interests of society as a whole, much less the defendant. To assume that every trier of fact is sufficiently acquainted with the wide ranging and shifting attributes of every media, much less to the evanescent boundaries of moral attitudes, when we are engaged in a course of diminishing freedom of expresion and moral

debate by punitive action is to engender the mischief of elevating know-nothingism or taboo to a substitute for proof.

Constitutional law and the general presumption of innocence both would require some indication other than the face of the publication itself, unless it is screamingly patent obscenity, solely depicting depraved acts, of a deviation below the community standard. If no such evidence is presented, the whim of any trier of fact as to community standard is the sole criterion and this is to make of courts or juries a particularly knowledgeable and unappealable group of censors. It assumes that the community standard is a matter of common knowledge. How easy, how conformist, how bland, society would be if a certitude as to community standard was a matter of common knowledge. How abandoned would be the whole course of theatrical criticism or study of literature or art or even study of sociology and psychology if the community standard were a matter of self-asserted and understood common knowledge. How, indeed, frozen in an inflexible, unyielding, unprogressive and stifling situation, would that community standard itself be rendered if its determination was at any given time a matter of consistent instinctual common knowledge. It is an unconstitutional condition automatically invading the First Amendment for the state to present without any qualified expertise evaluating the same in the content of such experts study of modes of presentation in that given field of presentation to submit as a prima facie case for criminal judgment anything which is not totally patent and crude hard-core pornography, devoid of the merest kind of artistry. This the State entirely failed to do in its presentation of this case and its case should have been dismissed.

Both our concepts of presumption of innocence and of free expression were reversed by the modes of proof fol-

lowed in this cause. The tail of exception wags the dog of basic right. The premonitions and warnings of Mr. Justice Harlan of just this situation contained in his separate opinion in *Roth* at 354 U.S. 495 through 508 are commended to the attention of the Court.

But the violation of the First and Sixth Amendments implicit in the mode of exonerating the prosecution from proof of a wrongdoing were compounded in this cause and matured to violations of the Fourteenth and Fifth Amendments by thereupon barring the defense from defensive proof. The refusal to allow the evaluation of the presentation within the framework of the community standard by an expert learned in the practices of the particular media, not only farther diminished the potentiality of justification of expression, but enlarged the anarchy which surrounds this entire area of law. Further, it precluded the defense from any possibility of other than hortatory defense in the area of the definitory aspects of obscenity, and was a deprivation *of rights* without due process.

The issue posed by Question Two was anticipated by Justice Frankfurter in *Smith* v. *California*, *supra* at 218:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of ques-

tioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.

"There is no external measuring rod for obscenity. Neither on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth* v. *United States*, 354 U.S. 476, 489, 1 L. ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal up-bringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards' . . ."

Additional relevant cases indicating that the power of the State to improvise presumptions or to substitute judicial notice or common knowledge in substitution for proof are limited by due process provisions of the Constitution, particularly in the context of causes diminishing the protections of the First Amendment are as follows: *Toth* v. *United States*, 319 U.S. 463; *Speiser* v. *Randall*, 357 U.S.

513; *New York Times* v. *Sullivan*, 376 U.S. 254; *Garrison* v. *Louisiana*, 379 U.S. 64; *Moore* v. *Dempsey*, 261 U.S. 86.

Question Three. Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

The question of the minimum limits of proof of the constitutionally required element of scienter in criminal obscenity procedures was before this court in *Redrup* v. *New York*, 384 U.S. 916. The question was not reached since the matter involved fell short of obscenity. It is the contention of the appellant that this latter aspect is true here as well. In the event, however, that this Court should disagree, we must still struggle herein with the scienter element. The State in this case merely proved that the film in question was exhibited to voluntary patrons on two occasions at the defendant corporation's licensed theatre. Indeed there was even failure to establish that it was the advertised billing. Even assuming that the rule under *Smith* v. *California*, 361 U.S. 147, permits that circumstances may warrant an inference that an individual handling matter was aware of its contents and its criminal import, actual or potential, and being aware thereof may be further inferred to have made an independent judgment to at least hold it out as appealing to prurient interest, (*Ginzburg* v. *United States*, 383 U.S. 463) (the assumption is not necessarily justified since *Redrup* did not reach the issue of demarcation of presumption) we are still faced with a difficult problem when we charge the corporate

entity and not the actual handling agent. As much as the individual book dealer is made a community censor by the effect of the California statute in *Smith* v. *California,* the corporate entity is forced by an exoneration of state adduced proof on the nature, scope and operating procedures of the corporation, in which specific exoneration the State of Ohio was indulged here, to precisely the frightened self-protecting, public depriving position repudiated in *Smith.* The slightest of proofs as to the most limited managerial qualities of a single cognizant agent might dissipate this impediment, but the total exoneration afforded the prosecution in this cause in an era when much of communication reposes in massive multi-agented corporate entities, constitutes too gross an impediment to the free circulation of expression. This is so evident that it even explains the compulsions to warp the actual facts adduced engaged in by the Court of Appeals of Hamilton County, earlier noted in the statement of facts (*Supra* page 7).

In *Mishkin* v. *New York,* 383 U.S. 502 at 511 this Court said:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

This language was applied to an individual defendant. When we compound the complexities of ascribation to individual mentality of an evil mens rea by making assumptions in relation to the corporate fiction, the values we seek to preserve by the requirement of scienter are even more imperiled.

Question Four. Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent

offensiveness offend the First Amendment to the Constitution of the United States?

The legislature of Ohio chose to freeze the definition of obscenity on October 11, 1961 by amendment to Section 2905.371 of the Ohio Revised Code. Ohio defines obscenity as follows:

> "A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In *Redrup* v. *New York, supra,* this Court per curiam announced as follows:

> "Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control or punish the distribution of any writings or pictures upon the ground of their 'obscenity'. A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless ' (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value'. *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418-419. Another Justice has not viewed the 'social value' element as an independent factor in the judgment of obscenity. Id. at 460-462 (dissenting opinion)." (emphasis in original)

To paraphrase the last paragraph of the *Redrup* decision which follows the above quote, whichever of the foregoing constitutional view is brought to bear upon Ohio's limited definition it is clear that Ohio has failed to provide for all the elements that must be considered before matter can be considered unprotected. The axiomatic lack of redeeming social value is ignored. The critical *patent* deviation aspect in the application of contemporary community standards is ignored. Other indefitness is contained in the grammatical interplay of Ohio's definition with the vital independent coalescence of elements noted in *Redrup* obviated thereby. Under Ohio's definition much beyond hard-core pornography is interdictable. Experience has shown that in the State and lower courts there has been massive misinterpretation of *Roth* v. *United States*, although even in that case Justice Brennan specifically enunciated the initial barrier to be overcome, an utter lack of any redeeming social importance. This Court has now time and time again had to remand or reverse in an effort to engender conceptual understanding. (*Redrup* v. *New York*, 384 U.S. 916; *Austin* v. *Kentucky*, 384 U.S. 916; *Gent* v. *Arkansas*, 384 U.S. 937; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Times Film Corporation* v. *Chicago*, 355 U.S. 835; *Sunshine Book Company* v. *Summerfield*, 355 U.S. 372; *Tralins* v. *Gerstem*, 378 U.S. 576; *Grove Press, Inc.* v. *Gerstem*, 378 U.S. 577; *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478; *One, Inc.* v. *Olesen*, 355 U.S. 361; *Smith* v. *California*, 375 U.S. 259; *Weiman* v. *Updegraff*, 344 U.S. 183). Pragmatically, this history of persistent misinterpretation may perhaps be reversed by a specific determination of the unconstitutionality of a legislative ossification of an inaccurate paraphrase of a portion only of *Roth's* and subsequent criteria.

Question Five. On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

In *Jacobellis* v. *Ohio, supra,* at p. 799, this Court stated as follows:

> "Hence we reaffirm the principle that in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Ohio chose here to exonerate itself from that duty. Without a glance at the picture — it never reached them under Ohio procedure — the Supreme Court of Ohio chose to ignore a contention that the movie involved was basically protected by the First and Fourteenth Amendments to the Federal Constitution, timely raised as an issue of *law* as well as fact. Rather Ohio sui sponde dismissed the cause as involving no debatable constitutional issue. Even assuming every state is the total master of its own appellate procedures, Ohio *having provided an appellate procedure,* may not dispense with an element thereof required by an application of the Federal Constitution. This in effect makes the accused in an obscenity case subject to unequal enforcement of the law. It is devoutly to be hoped that once the narrow limitation of *Roth's* exception to the protections of the First Amendment are understood as they were meant to be, and as this Court has reaffirmed time and time again, as lately as *Redrup, supra,* that a mode can be

established, to make of obscenity an issue of fact solely. But the very improper and ill defined application involved in the case at bar reaffirms the compelling present need of the principle quoted from *Jacobellis* above as a dike against a sea of intolerance swamping the First Amendment.

CONCLUSION

Therefore, this Court, in consideration of the five points set forth in this statement should grant an appeal from the Supreme Court of the State of Ohio, declare in violation of the 1st and 14th Amendments to the U. S. Constitution O.R.C. 2905.34 as defined by O.R.C. 2905.371 and reverse the conviction of the I. M. Amusement Corporation.

Respectfully submitted,

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Cincinnati, Ohio 45202

Counsel for Petitioner

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO
1967 Term

To wit February 15, 1967

No. 40574

THE STATE OF OHIO
City of Columbus

THE STATE OF OHIO,
Plaintiff-Appellee,
vs.
I. M. AMUSEMENT CORP.,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
For Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment

into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of .....

Thomas L. Startzman, Clerk

APPENDIX "B"

THE STATE OF OHIO, APPELLEE, v. I. & M. AMUSEMENTS, INC., APPELLANT.

[Cite as State v. I. & M. Amusements, Inc., 10 Ohio App. 2d 153.]

Corporations—Operation of motion picture theater—Knowledge of agent attributable to corporation—Exhibiting obscene picture—Corporation and agents guilty of offense.

1. A corporation acts solely through its agents. And the knowledge of an agent of a corporation owning and operating a motion picture theater acting within the scope of his employment will be attributed to such corporation in the ordinary operation of its motion picture theater.
2. Where the agents of a corporation which owns and operates a motion picture theater advertise and exhibit an obscene motion picture, such corporation may be guilty of the offense (exhibiting an obscene motion picture

film) along with the agents who advertise and exhibit such film on its behalf.

(No. 9578—Decided August 22, 1966.)

APPEAL: Court of Appeals for Hamilton County.

Mr. Raymond E. Shannon and *Mr. Calvin W. Prem*, for appellee.

Mr. Allen Brown and *Mr. Harry A. Abrams*, for appellant.

HOVER, J. This is an appeal as of right from a judgment against the defendant corporation in the court below wherein it was convicted of violating Section 2905.34 of the Revised Code in that it did unlawfully and knowingly exhibit an obscene motion picture film. A jury was waived in the court below and the evidence submitted solely to the judge. In this event, under the law of Ohio, the judge himself acts as the presiding officer at the trial and as a jury in determining factual issues. (See 53 Ohio Jurisprudence 2d 348 to 354, inclusive.) The appeal was heard in this court on defendant-appellant's assignments of error, a transcript of the trial proceedings including the exhibits considered by the court, and the briefs and arguments of counsel.

Defendant assigns some twenty alleged errors, of which several require consideration here. The operative facts are not in dispute. On the day before the arrest, the attention of the police was called to the movie specifically involved here by an interested civilian with whom a police officer visited the theater and viewed the motion picture. The next day two police officers returned to the theater, viewed the same motion picture, made an arrest and took possession of the evidence, that is, the film. This was viewed by the trial court sitting as a jury, and was also reviewed by this court in its examination of the record.

The film shown was advertised in the public press at the time of the showing and was the subject of a permit received by the defendant, required by city ordinance pursuant to an admission-tax ordinance of the city.

Defendant's assignments of error relative to the weight of the evidence before the jury (in this case the court) is not an appropriate subject for review here, where the record shows that there is sufficient evidence in the record, if believed by the trier of the facts, to justify the conviction.

Defendant's assignments of error relative to the defendant's intent, *mens rea* and *scienter*, are not well taken upon authority of *State* v. *Mazes*, 7 Ohio St. 2d 136; *State* v. *Mazes*, 3 Ohio App. 2d 90; and *Mishkin* v. *New York*, 383 U.S. 502, since, as it will appear, *infra*, the corporation acts solely through its agents who, in this instance, both advertised and exhibited the alleged obscene material. The knowledge of the agent acting within the scope of his employment will be attributed to the corporation in the ordinary operation of a motion picture theater. It would do violence to one's intelligence to suggest that the agents acquiring and exhibiting the corporation's product for public consumption would not be aware of the content and nature of the attraction offered at any given time.

Defendant further complains that the exhibit seized by the police and viewed as evidence by the court did not carry any title to connect it with the feature advertised by the theater.

Suffice it to say, there is no doubt that the exhibit viewed by the court below was conclusively identified by the police witnesses as the film exhibited at the theater performance. It might well be observed at this point, in the words of the poet, that "a rose by any other name would smell as sweet."

The same thing might be said of the defense expert witness on the subject of motion picture standards and prac-

tices, that the one segment of the film in question was simply "a documentation of moving pinups, in some cases static pinups,"—a pinup being "simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static."

The expert witness defines a convention, as he uses the term, as "an established and presumably accepted form of appearance and performance that is established over the years as being a conventional way of appearing and performing for whatever purpose in artistic endeavor." Obviously, this does not conform to the standards of obscenity set out in the *Roth* v. *United States*, 354 U.S. 476, nor is it helpful in defining the standards of this community. The statute as written and interpreted sets out no special standards or exceptions for theatrical presentation, and the law must apply the same obscenity standard to any material regardless of the medium of circulation or exhibition.

In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, "two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians."

Lastly, as pointed out in *State* v. *Carney*, 113 Ohio App. 280, the corporation may be equally guilty of an offense along with those individuals who perform the same acts on its behalf. The court states correctly at page 283:

"* * * If a corporation offends, it is necessary that it do so through the action of an individual; if an individual offends, either on his own account or on behalf of a corpora-

tion, either he or both are criminally responsible. One may be the principal offender while the other aids, abets or procures the commission of the offense. Section 1.17, Revised Code. The guilt of one will not exculpate the other."

There is a thorough discussion of the criminal liability of corporations, even where intent or malice or similar mental states are involved, acting through agents within the scope of their authority. See 19 Corpus Juris Secundum 1073 through 1079.

In view of the foregoing, it is the opinion of this court that there was no error prejudicial to the rights of defendant in the trial below, and the verdict and judgment are, accordingly, affirmed.

Judgment affirmed.

HILDEBRANT, P. J., and LONG, J., concur.

APPENDIX "C"

OPINION OF THE COURT OF COMMON PLEAS, Hamilton County, Ohio

No. 83080

STATE OF OHIO,

Plaintiff,

vs.

I. M. AMUSEMENTS, INC.,

Defendant.

RECORD — PAGE 67

"THE COURT: The film in question here was exhibited in the courtroom. The first scene of that film depicted two women, nude at least to their waists, going through actions that could lead to no conclusion, in my opinion, except that they were behaving like Lesbians.

There were other parts of the picture in which there were absolutely nude women.

There is no question in the Court's mind, nor has there been since this picture was viewed, but that it came within the purview of the statute.

There is no question but that an offense under the law of Ohio has been committed.

There is no question but that the defendant corporation is the one that committed the offense, and so the Court finds the defendant guilty as charged in the indictment.

The sentence and judgment of the Court is that the

defendant corporation be fined the sum of $250.00 and costs, and desist from the showing of this film."*

* Appellant's note:

The Ohio statute involved (O.R.C. 2905.34) provides no authority for the court to enjoin or make part of sentence injunction against further presentation. This unenforceable gratuity on the part of the Court is inexplicable, save perhaps in psychological terms.

APPENDIX "D"

O. R. C. § 2905.34

No person shall knowingly, sell, lend, give away, exhibit, or offer to sell, lend, give away or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or ac-

counts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor any of such books, papers, magazines, or pictures.

Whoever violates this section shall be finde not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

O.R.C. § 2905.371

Sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any newspaper, magazine, or other publication which is entered as second class matter by the post-office department. This immunity shall not apply to any newspaper, magazine, or other publication which is obscene. A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

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No. 260

In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

I. M. AMUSEMENT CORP.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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In The

Supreme Court of the United States

October Term 1966

No. ———

I. M. AMUSEMENT CORP.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered on February 15, 1967, which denied appeal as of right from the Court of Appeals for Hamilton County, Ohio (First Appellate District of Ohio) for the reason that no substantial constitutional question exists therein, and affirmed Petitioner's conviction for exhibiting an obscene motion picture. Notice of Appeal to the Supreme Court of the United States was filed in both the Supreme Court of Ohio and the Court of Appeals, First Appellate District of Ohio, on May 13, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals of the First Appellate District, Hamilton County, Ohio is reported at 10 Ohio App. 2d 153, and printed herein as Appendix A.

The judgment entry of the Supreme Court of Ohio is printed herein as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 2101, and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional questions to be presented by this Petition for Writ of Certiorari, all of which were presented to the trial court except for Question Five which first arose as a question of constitutional magnitude on the appeal from the Court of Appeals to the Supreme Court of Ohio, as shall hereinafter be more fully indicated, and all of which were argued on appeal to the Supreme Court of Ohio are as follows:

(1) Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and falling within the contemporary community standard as not appealing to prurient interest?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on

any alleged obscene aspect of the motion picture in question or pandering by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity, charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

(4) Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States? (O.R.C. § 2905.34 and § 2905.371 appear in Appendix C hereof).

(5) On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On June 12, 1963, a police officer of the City of Cincinnati, Ohio accompanied by an officer of a group known as Citizens for Decent Literature and Motion Pictures as paid admittees viewed a portion of a film, referred to in the later indictment as "Artist's Models", and a feature movie at the *Imperial Theatre* in that city. The police officer returned the next day to said theatre, once again paying the price of admission. He again observed the self-same portion of the film in question in this cause and thereupon confiscated the same, and cited the corporate defendant for violation of O.R.C. § 2905.34 (Obscenity statute), (R. 4-20)

A motion to dismiss was filed against the subsequent indictment on several grounds, including the unconstitutionality, under the First Amendment to the United States Constitution, of Ohio's obscenity statute O.R.C. § 2905.34 as defined by O.R.C. § 2905.371, and the privileged nature of the charged film. Said motion was overruled without a viewing of the film. On coming on for trial a jury was waived. The State offered no evidence as to the obscenity of

the film, its patent offensiveness, its departure from community standards, or its lack of redeeming social importance. The police officer who seized the film testified *solely* to the facts set forth in the first paragraph of this Statement of Facts. He made no mention of any alleged manager of the theatre or any conversation or dealings, if any, with such a person, or any other corporate agent. (R. 4-20) The film was introduced into evidence and shown in the courtroom for the officer's identification. It consisted of a series of shots of partially nude female models, making no particularly suggestive motions or actions, and some dances commonly known as the strip tease or belly dance. The officer admitted on cross-examination that only about the first half of the same had been shown on the two days in question. The film was silent, but the Court barred questioning on cross-examination that in the showing of it at the theatre a non-inflammatory musical background was provided. (R. 15) The film, as introduced and exhibited in court, bore no title, but was called in the indictment "Artist's Models". (R. 20-21) It was stipulated that there was an existing de jure and de facto corporation known as I. M. Amusement Corporation under the laws of the State of Ohio, but no other evidence of any acts of said corporation was offered. (The Defense never raised the question of variance of name between indictment and corporate charter.) The State then offered evidence that a William Berger signing as an officer of the I. M. Amusement Corporation inserted an advertisement in the Cincinnati Post-Times Star for June 11, 12 and 13 announcing the billing for the Imperial Theatre. A copy of this advertisement referring to a feature picture (not contended by the State to be the picture in question) and a short subject called "Beauteause Models" was introduced into evidence. (Exhibit 2) No evidence was offered to explain the discrepancy or indicate "Beau-

tease Models" was the picture in question. The State then rested. Motion was then made for dismissal, which the Court took under submission, asking for memorandum.

The defendant submitted a memorandum in which state and federal constitutional questions re the lack of obscenity of the film in question, the lack of any state adduced proof of obscenity, the inadequacy of proof of scienter and/or purpose to disseminate as obscene, especially of a corporate entity, as well as constitutional arguments previously advanced in pre-trial motions were advanced.

An additional due process grounds, to-wit, failure of the prosecution to prove the witting offering of the picture in question or adequately any act whatsoever of the defendant, I. M. Amusement Corporation, was also urged. After a passage of approximately two weeks, the prosecution asked and was granted leave to re-open its case. (R. 34) At this time the prosecution introduced evidence that a license had been issued generally to the I. M. Amusement Corporation for the operation of the Imperial Theatre as a motion picture theatre for a fiscal year encompassing June 12 and 13, 1963. (R. 34-42) (No evidence was submitted of the licensing of the film in question, nor is any such required by the ordinances of the City of Cincinnati or the statutes of the State of Ohio. It is assumed that language to the contrary in the third paragraph of the opinion of Hover, J. of the Court of Appeals, First Appellate District of Ohio, reprinted as Appendix A, is a mere inadvertent misstatement of fact.) The State once again rested, and the Court thereupon forthwith denied the motion for dismissal with no comment on any of the multiple constitutional grounds offered in support of said motion. (R. 44) The defense, reserving its exceptions, then offered as a witness the head of Cincinnati's Civic Theatre, The Playhouse in the Park. This witness testi-

fied to his background as follows: He has had post graduate training in the theatrical and cinematographic arts, had written his thesis on theatrical and cinema psychological impact and communal acceptance, and had seven years practical experience in theatrical and movie presentation and production in Princeton, New Jersey, New York, New York, and Cincinnati, Ohio. The Court refused to hear further testimony from this witness that the depictions of the picture in question did not affront existing and widespread contemporary community standards relating to the depiction or representation of the semi-draped female form; that the picture depicted only strip-tease, burlesque dancing, or female tableaux which are accepted theatrical and night club movie conventions of many years standing in both the local and national community, such convention being so established as to have achieved redeeming social value as entertainment. (R. 47-56) The defense then rested. No rebuttal was offered by the State. The Court forthwith returned a verdict of guilty. (Appendix E) This appeal was carried forward to the Court of Appeals, which after argument rendered the opinion set forth in Appendix B.

Appeal was carried from the Court of Appeals to the Supreme Court of Ohio both as of right and on leave to certify the record. *Without certification of the record and without any possible inspection of the charged film, which reposed with the Court of Appeals pending admission to the Supreme Court of Ohio,* the Supreme Court of Ohio dismissed the appeal sua sponte for the reason that no substantial constitutional question exists. (Appendix A) Appellant argued among other constitutional arguments heretofore indicated both by brief and orally before the Supreme Court of Ohio, that the film in question was not and could not be considered as a matter of both law and fact prohibitable or punishable obscenity.

REASONS FOR ISSUING THE WRIT

INTRODUCTORY

This cause should be reversed and remanded on the authority of *State of Ohio* v. *Jacobellis*, 378 U.S. 184. In that case Ohio eagerly found the movie "The Lovers" obscene. When the case reached the Supreme Court, Justice Brennan said ". . . . We have reviewed the film in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enumerated in *Roth* v. *United States* and *Albert* v. *California*". Ohio has now ignored stare decisis not only by perfunctorily affirming a conviction on a movie that is not patently offensive, does not depict total nudity or reveal genitalia, or even suggest the sexual act without even looking at the film, but indeed approves, a procedure in which the State offered *no evidence whatsoever* of deviation below the community standard, or of any act upon the part of the defendant even hinting guilty knowledge or pandering intent and the Court refused defense adduced evidence of the contrary. Indeed, hardly chastened by *Jacobellis*, the Supreme Court of Ohio even finds no substantial debatable constitutional question. Ohio elevates the presence of any sexuality, or to be charitable even a dominant theme of sexuality in the matter presented to a doctrine of prima facie proof of all the elements of the crime of disseminating obscenity. Indeed the inference of allowance of prima facie proof is inadequate. The Supreme Court of Ohio found no debatable constitutional question when the lower court refused testimony on the contemporary community standard on the part of the defense. We are indeed dealing with not merely prima facie proof but apparently an irrefutable presumption. Ohio has revenged its reversal in *Jacobellis* by enlarging Roth, which put obscenity beyond

the pale of the protection of the First Amendment by creating a doctrine that if the dominant theme is female sexual attractiveness the matter and its disseminator are apparently beyond the protection of all constitutional safeguards.

Question One. Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and following within the contemporary community standard as not appealing to prurient interests?

It has recently been made once again evident in *Robert Redrup* v. *State of New York,* 384 U.S. 916, and companion cases decided May 9, 1967 by this court, that a wide and disturbing variance exists between the constitutional boundaries of both the defindory limits and means of adjudicating obscenity as enunciated by this Court, and as applied by some state courts, particularly Ohio. (See *Ohio* v. *Jacobellis,* 378 U.S. 184, *Ohio* v. *Mapp,* 170 O.S. 427, *Ohio* v. *Mapp,* 367 U.S. 643, *State of Ohio* v. *Mazes,* 7 O.S. 2d 136, reversed No. 896 Supreme Court of the United States, Oct. Term 1966.) Yet Ohio, like many other states, persists in enlarging the severely limited exception to full expression, labeled obscenity, to an almost total possibility of obliteration of sexuality as a subject of free expression. If the matter contains indication of a sexual interest the prosecution becomes a res ipse loquitor matter with almost total exemption of the prosecution from all the normal attributes of proving a wilful crime. The possibility of a prurient reaction becomes the entire sustenance of a state's case.

Counsel has carefully seen to it that the entire reel of the film in question in this case has been forwarded to the Court for its inspection. In view of the *Redrup* deci-

sion the Court is requested to have its most naive clerk inspect the same. It is so blandly commonplace that it is almost an absurdity that we are, at this juncture, in this century involved in a charge at all. The picture is a harmless collection of pinups less revealing or suggestive than those depicted in the periodicals considered in *Gent, et al* v. *The State of Arkansas,* 384 U.S. 937 or *Austin* v. *Kentucky,* 384 U.S. 916. Nowhere in the picture is the entirely unconcealed female form shown. There is no mixing of sexes. No hectic or erotic dances are presented unless the common places of the burlesque theatre long accepted, even forty years ago in the dicta of late Justice Holmes, have after all these years suddenly become, in an exercise of pious hypocrisy, beyond the realm of widespread acceptance. There is no simulation, symbolizing, or pantomining of sexual acts. One scene was described by the trial court as follows:

> "Two women, at least nude to the waist, going through actions which lead to no conclusion in my opinion except that they were behaving like lesbians." (Appendix C)

The scene depicts nothing except two partially draped females posing who have no contact or conversation with one another, except at one point for about two seconds duration one playfully pretends to tickle the other on the *nose* with a feather.. Honi soit qui mal y pense has been reversed to a point of polishing off the First Amendment in Ohio. The picture does not even show total nudity, but only a form of dance and pose so long tolerated in the national community and indeed even in the local community in which this case was tried, as to have established redeeming social importance as a mode of light entertainment.

The Court is not even faced in this matter with determining whether applying the contemporary community standards in the description or representation of sexual matters affords a reference to consensus, majority point of view, significant minority or the outer limits of toleration, a difficult issue yet to be specifically enunciated, although the inference from decisions and the logic of freedom of expression indicate the last concept already applies. The problem is not reached for the depictions of this picture are so commonplace in the light of the history of the burlesque or follies theatre in this country, the night club act, go-go girls, barracks pin-ups, and similar matters that the problem is not even posed. The State offered not a scintilla of extrinsic or relative evidence that the movie was below the community standard, nor of any other element of obscenity. Nor did the State offer any evidence whatsoever that the defendant in any way engaged in pandering in showing the picture, the trial court even barring evidence of the contrary.

Question Two. Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on any alleged obscene aspect of the motion picture in question or pandering of the picture by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

In *Friedman* v. *Maryland*, 85 S. Ct. 784, 380 U.S. 51,

this Court states "First the burden of proving that the film was unprotected expression must rest on the censor". This was stated in relation to a civil matter, not the more sensitive criminal proceeding involved herein. What happened in this case was that the prosecutor merely identified the seized movie and rested. From then on it became a defensive burden to prove it was protected utterance. An approved prosecutory procedure of proof which purports to dispense with any requirements of the adduction of evidence establishing the essential relativity which is implied in the various elements of the definition of obscenity ultimately results in the immediate imposition of unconstitutional limitations on the publics access to constitutionally protected matter. *Speiser* v. *Randall,* 357 U.S. 513, 525; *Smith* v. *California,* 361 U.S. 147; *Marcus* v. *Search Warrants of Property,* 367 U.S. 717; *A Quantity of Books* v. *Kansas,* 378 U.S. 205. A depiction, isolated unto itself, gives no information as to what are the limits of candor in the nation as a whole, nor in a viable, exploratory, intellectual, searching society in which at every moment there is a fresh and bold adventure of ideas and the modes of expressing them, both in every area of essential interest to humanity including that large, intense and important area of mans interest, his own sexuality, and in variant medias each uniquely different and not necessarily known to all persons, to leave to the laws of chance and the infinite subjectivity of any particular trier of whether any given exploration is within the realm of this moment's community standard is prejudicial to the interests of society as a whole, much less the defendant. To assume that every trier of fact is sufficiently acquainted with the wide ranging and shifting attributes of every media, much less to the evanescent boundaries of moral attitudes, when we are engaged in a course of diminishing freedom of expression and moral

debate by punitive action is to engender the mischief of elevating know-nothingism or taboo to a substitute for proof.

Constitutional law and the general presumption of innocence both would require some indication other than the face of the publication itself, unless it is screamingly patent obscenity, solely depicting depraved acts, of a deviation below the community standard. If no such evidence is presented, the whim of any trier of fact as to community standard is the sole criterion and this is to make of courts or juries a particularly knowledgeable and unappealable group of censors. It assumes that the community standard is a matter of common knowledge. How easy, how conformist, how bland, society would be if a certitude as to community standard was a matter of common knowledge. How abandoned would be the whole course of theatrical criticism or study of literature or art or even study of sociology and psychology if the community standard were a matter of self-asserted and understood common knowledge. How, indeed, frozen in an inflexible, unyielding, unprogressive and stifling situation, would that community standard itself be rendered if its determination was at any given time a matter of consistent instinctual common knowledge. It is an unconstitutional condition automatically invading the First Amendment for the state to present without any qualified expertise evaluating the same in the context of such experts study of modes of presentation in that given field of presentation to submit as a prima facie case for criminal judgment anything which is not totally patent and crude hard-core pornography, devoid of the merest kind of artistry. This the State entirely failed to do in its presentation of this case and its case should have been dismissed.

Both our concepts of presumption of innocence and of free expression were reversed by the modes of proof fol-

lowed in this cause. The tail of exception wags the dog of basic right. The premonitions and warnings of Mr. Justice Harlan of just this situation contained in his separate opinion in *Roth* at 354 U.S. 495 through 508 are commended to the attention of the Court.

But the violation of the First and Sixth Amendments implicit in the mode of exonerating the prosecution from proof of a wrongdoing were compounded in this cause and matured to violations of the Fourteenth and Fifth Amendments by thereupon barring the defense from defensive proof. The refusal to allow the evaluation of the presentation within the framework of the community standard by an expert learned in the practices of the particular media, not only farther diminished the potentiality of justification of expression, but enlarged the anarchy which surrounds this entire area of law. Further, it precluded the defense from any possibility of other than hortatory defense in the area of the definitory aspects of obscenity, and was a deprivation of rights without due process.

The issue posed by Question Two was anticipated by Justice Frankfurter in *Smith* v. *California, supra* at 218:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of quest-

tioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.

"There is no external measuring rod for obscenity. Neither on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth* v. *United States*, 354 U.S. 476, 489, 1 L. ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal up-bringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards' . . ."

Additional relevant cases indicating that the power of the State to improvise presumptions or to substitute judicial notice or common knowledge in substitution for proof are limited by due process provisions of the Constitution, particularly in the context of causes diminishing the protections of the First Amendment are as follows: *Toth* v. *United States*; 319 U.S. 463; *Speiser* v. *Randall*, 357 U.S.

513; *New York Times* v. *Sullivan*, 376 U.S. 254; *Garrison* v. *Louisiana*, 379 U.S. 64; *Moore* v. *Dempsey*, 261 U.S. 86.

Question Three. Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

The question of the minimum limits of proof of the constitutionally required element of scienter in criminal obscenity procedures was before this court in *Redrup* v. *New York*, 384 U.S. 916. The question was not reached since the matter involved fell short of obscenity. It is the contention of the appellant that this latter aspect is true here as well. In the event, however, that this Court should disagree, we must still struggle herein with the scienter element. The State in this case merely proved that the film in question was exhibited to voluntary patrons on two occasions at the defendant corporation's licensed theatre. Indeed there was even failure to establish that it was the advertised billing. Even assuming that the rule under *Smith* v. *California*, 361 U.S. 147, permits that circumstances may warrant an inference that an individual handling matter was aware of its contents and its criminal import, actual or potential, and being aware thereof may be further inferred to have made an independent judgment to at least hold it out as appealing to prurient interest, (*Ginzburg* v. *United States*, 383 U.S. 463) (the assumption is not necessarily justified since *Redrup* did not reach the issue of demarcation of presumption) we are still faced with a difficult problem when we charge the corporate

entity and not the actual handling agent. As much as the individual book dealer is made a community censor by the effect of the California statute in *Smith* v. *California*, the corporate entity is forced by an exoneration of state adduced proof on the nature, scope and operating procedures of the corporation, in which specific exoneration the State of Ohio was indulged here, to precisely the frightened self-protecting, public depriving position repudiated in *Smith*. The slightest of proofs as to the most limited managerial qualities of a single cognizant agent might dissipate this impediment, but the total exoneration afforded the prosecution in this cause in an era when much of communication reposes in massive multi-agented corporate entities, constitutes too gross an impediment to the free circulation of expression. This is so evident that it even explains the compulsions to warp the actual facts adduced engaged in by the Court of Appeals of Hamilton County, earlier noted in the statement of facts (*Supra* page 7).

In *Mishkin* v. *New York*, 383 U.S. 502 at 511 this Court said:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

This language was applied to an individual defendant. When we compound the complexities of ascribation to individual mentality of an evil mens rea by making assumptions in relation to the corporate fiction, the values we seek to preserve by the requirement of scienter are even more imperiled.

Question Four. Does Ohio's statutory definition of obscenity (O.R.C. § 2905.371) which does not provide for any consideration of redeeming social importance or patent

offensiveness offend the First Amendment to the Constitution of the United States?

The legislature of Ohio chose to freeze the definition of obscenity on October 11, 1961 by amendment to Section 2905.371 of the Ohio Revised Code. Ohio defines obscenity as follows:

> "A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In *Redrup* v. *New York, supra,* this Court per curiam announced as follows:

> "Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control or punish the distribution of any writings or pictures upon the ground of their 'obscenity'. A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value'. *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418-419. Another Justice has not viewed the 'social value' element as an independent factor in the judgment of obscenity. Id. at 460-462 (dissenting opinion)." (emphasis in original)

To paraphrase the last paragraph of the *Redrup* decision which follows the above quote, whichever of the foregoing constitutional view is brought to bear upon Ohio's limited definition it is clear that Ohio has failed to provide for all the elements that must be considered before matter can be considered unprotected. The axiomatic lack of redeeming social value is ignored. The critical *patent* deviation aspect in the application of contemporary community standards is ignored. Other indefitness is contained in the grammatical interplay of Ohio's definition with the vital independent coalescence of elements noted in *Redrup* obviated thereby. Under Ohio's definition much beyond hard-core pornography is interdictable. Experience has shown that in the State and lower courts there has been massive misinterpretation of *Roth* v. *United States,* although even in that case Justice Brennan specifically enunciated the initial barrier to be overcome, an utter lack of any redeeming social importance. This Court has now time and time again had to remand or reverse in an effort to engender conceptual understanding. (*Redrup* v. *New York,* 384 U.S. 916; *Austin* v. *Kentucky,* 384 U.S. 916; *Gent* v. *Arkansas,* 384 U.S. 937; *Jacobellis* v. *Ohio,* 378 U.S. 184; *Memoirs* v. *Massachusetts,* 383 U.S. 413; *Times Film Corporation* v. *Chicago,* 355 U.S. 835; *Sunshine Book Company* v. *Summerfield,* 355 U.S. 372; *Tralins* v. *Gerstem,* 378 U.S. 576; *Grove Press, Inc.* v. *Gerstem,* 378 U.S. 577; *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478; *One, Inc.* v. *Olesen,* 355 U.S. 361; *Smith* v. *California,* 375 U.S. 259; *Weiman* v. *Updegraff,* 344 U.S. 183). Pragmatically, this history of persistent misinterpretation may perhaps be reversed by a specific determination of the unconstitutionality of a legislative ossification of an inaccurate paraphrase of a portion only of *Roth's* and subsequent criteria.

Question Five. On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

In *Jacobellis* v. *Ohio, supra,* at p. 799, this Court stated as follows:

> "Hence we reaffirm the principle that in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Ohio chose here to exonerate itself from that duty. Without a glance at the picture — it never reached them under Ohio procedure — the Supreme Court of Ohio chose to ignore a contention that the movie involved was basically protected by the First and Fourteenth Amendments to the Federal Court, timely raised as an issue of *law* as well as fact. Rather Ohio sui sponde dismissed the cause as involving no debatable constitutional issue. Even assuming every state is the total master of its own appellate procedures, Ohio *having provided an appellate procedure,* may not dispense with an element thereof required by an application of the Federal Constitution. This in effect makes the accused in an obscenity case subject to unequal enforcement of the law. It is devoutly to be hoped that once the narrow limitation of *Roth's* exception to the protections of the First Amendment are understood as they were meant to be, and as this Court has reaffirmed time and time again, as lately as *Redrup, supra,* that a mode can be

established, to make of obscenity an issue of fact solely. But the very improper and ill defined application involved in the case at bar reaffirms the compelling present need of the principle quoted from *Jacobellis* above as a dike against a sea of intolerance swamping the First Amendment.

CONCLUSION

Therefore, this Court, in consideration of the five points set forth in this Petition, should grant a Writ of Certiorari to the Supreme Court of the State of Ohio and reverse the conviction of the I. M. Amusement Corporation.

Respectfully submitted,

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APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO
1967 Term

To wit February 15, 1967

No. 40574

THE STATE OF OHIO
City of Columbus

THE STATE OF OHIO,
Plaintiff-Appellee,
vs.
I. M. AMUSEMENT CORP.,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
For Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment

into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of .....

Thomas L. Startzman, Clerk

APPENDIX "B"

THE STATE OF OHIO, APPELLEE, v. I. & M. AMUSEMENTS, INC., APPELLANT.

[Cite as State v. I. & M. Amusements, Inc., 10 Ohio App. 2d 153.]

Corporations—Operation of motion picture theater—Knowledge of agent attributable to corporation—Exhibiting obscene picture—Corporation and agents guilty of offense.

1. A corporation acts solely through its agents. And the knowledge of an agent of a corporation owning and operating a motion picture theater acting within the scope of his employment will be attributed to such corporation in the ordinary operation of its motion picture theater.
2. Where the agents of a corporation which owns and operates a motion picture theater advertise and exhibit an obscene motion picture, such corporation may be guilty of the offense (exhibiting an obscene motion picture

film) along with the agents who advertise and exhibit such film on its behalf.

(No. 9578—Decided August 22, 1966.)

APPEAL: Court of Appeals for Hamilton County.

Mr. Raymond E. Shannon and *Mr. Calvin W. Prem*, for appellee.

Mr. Allen Brown and *Mr. Harry A. Abrams*, for appellant.

HOVER, J. This is an appeal as of right from a judgment against the defendant corporation in the court below wherein it was convicted of violating Section 2905.34 of the Revised Code in that it did unlawfully and knowingly exhibit an obscene motion picture film. A jury was waived in the court below and the evidence submitted solely to the judge. In this event, under the law of Ohio, the judge himself acts as the presiding officer at the trial and as a jury in determining factual issues. (See 53 Ohio Jurisprudence 2d 348 to 354, inclusive.) The appeal was heard in this court on defendant-appellant's assignments of error, a transcript of the trial proceedings including the exhibits considered by the court, and the briefs and arguments of counsel.

Defendant assigns some twenty alleged errors, of which several require consideration here. The operative facts are not in dispute. On the day before the arrest, the attention of the police was called to the movie specifically involved here by an interested civilian with whom a police officer visited the theater and viewed the motion picture. The next day two police officers returned to the theater, viewed the same motion picture, made an arrest and took possession of the evidence, that is, the film. This was viewed by the trial court sitting as a jury, and was also reviewed by this court in its examination of the record.

The film shown was advertised in the public press at the time of the showing and was the subject of a permit received by the defendant, required by city ordinance pursuant to an admission-tax ordinance of the city.

Defendant's assignments of error relative to the weight of the evidence before the jury (in this case the court) is not an appropriate subject for review here, where the record shows that there is sufficient evidence in the record, if believed by the trier of the facts, to justify the conviction.

Defendant's assignments of error relative to the defendant's intent, *mens rea* and *scienter*, are not well taken upon authority of *State* v. *Mazes*, 7 Ohio St. 2d 136; *State* v. *Mazes*, 3 Ohio App. 2d 90; and *Mishkin* v. *New York*, 383 U.S. 502, since, as it will appear, *infra*, the corporation acts solely through its agents who, in this instance, both advertised and exhibited the alleged obscene material. The knowledge of the agent acting within the scope of his employment will be attributed to the corporation in the ordinary operation of a motion picture theater. It would do violence to one's intelligence to suggest that the agents acquiring and exhibiting the corporation's product for public consumption would not be aware of the content and nature of the attraction offered at any given time.

Defendant further complains that the exhibit seized by the police and viewed as evidence by the court did not carry any title to connect it with the feature advertised by the theater.

Suffice it to say, there is no doubt that the exhibit viewed by the court below was conclusively identified by the police witnesses as the film exhibited at the theater performance. It might well be observed at this point, in the words of the poet, that "a rose by any other name would smell as sweet."

The same thing might be said of the defense expert witness on the subject of motion picture standards and prac-

tices, that the one segment of the film in question was simply "a documentation of moving pinups, in some cases static pinups,"—a pinup being "simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static."

The expert witness defines a convention, as he uses the term, as "an established and presumably accepted form of appearance and performance that is established over the years as being a conventional way of appearing and performing for whatever purpose in artistic endeavor." Obviously, this does not conform to the standards of obscenity set out in the *Roth* v. *United States,* 354 U.S. 476, nor is it helpful in defining the standards of this community. The statute as written and interpreted sets out no special standards or exceptions for theatrical presentation, and the law must apply the same obscenity standard to any material regardless of the medium of circulation or exhibition.

In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, "two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians."

Lastly, as pointed out in *State* v. *Carney,* 113 Ohio App. 280, the corporation may be equally guilty of an offense along with those individuals who perform the same acts on its behalf. The court states correctly at page 283:

"* * * If a corporation offends, it is necessary that it do so through the action of an individual; if an individual offends, either on his own account or on behalf of a corpora-

tion, either he or both are criminally responsible. One may be the principal offender while the other aids, abets or procures the commission of the offense. Section 1.17, Revised Code. The guilt of one will not exculpate the other."

There is a thorough discussion of the criminal liability of corporations, even where intent or malice or similar mental states are involved, acting through agents within the scope of their authority. See 19 Corpus Juris Secundum 1073 through 1079.

In view of the foregoing, it is the opinion of this court that there was no error prejudicial to the rights of defendant in the trial below, and the verdict and judgment are, accordingly, affirmed.

Judgment affirmed.

HILDEBRANT, P. J., and LONG, J., concur.

APPENDIX "C"

OPINION OF THE COURT OF COMMON PLEAS, Hamilton County, Ohio

No. 83080

STATE OF OHIO,

Plaintiff,

vs.

I. M. AMUSEMENTS, INC.,

Defendant.

RECORD — PAGE 67

"THE COURT: The film in question here was exhibited in the courtroom. The first scene of that film depicted two women, nude at least to their waists, going through actions that could lead to no conclusion, in my opinion, except that they were behaving like Lesbians.

There were other parts of the picture in which there were absolutely nude women.

There is no question in the Court's mind, nor has there been since this picture was viewed, but that it came within the purview of the statute.

There is no question but that an offense under the law of Ohio has been committed.

There is no question but that the defendant corporation is the one that committed the offense, and so the Court finds the defendant guilty as charged in the indictment.

The sentence and judgment of the Court is that the

defendant corporation be fined the sum of $250.00 and costs, and desist from the showing of this film."*

* Appellant's note:

The Ohio statute involved (O.R.C. 2905.34) provides no authority for the court to enjoin or make part of sentence injunction against further presentation. This unenforceable gratuity on the part of the Court is inexplicable, save perhaps in psychological terms.

APPENDIX "D"

O. R. C. § 2905.34

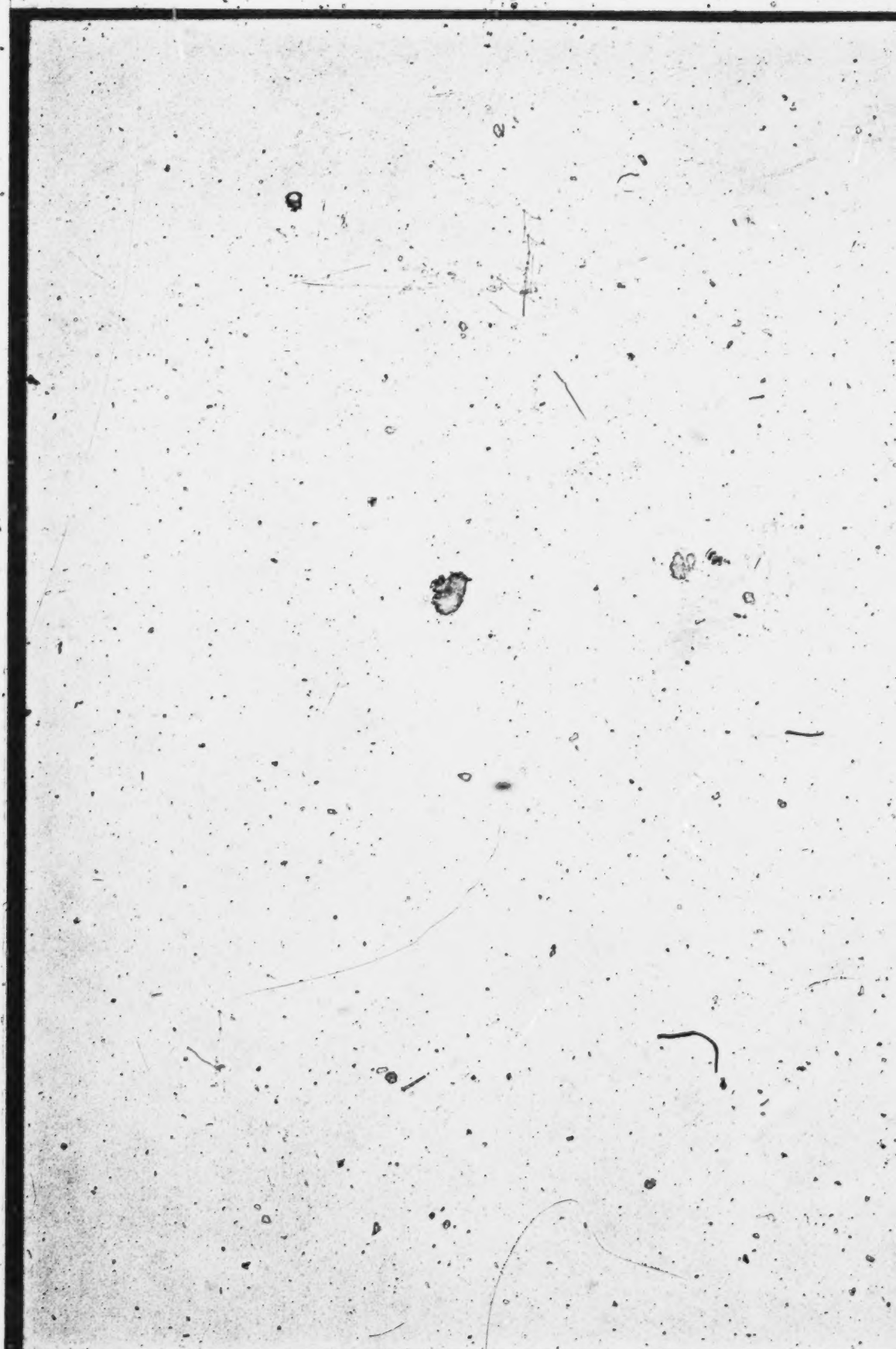
No person shall knowingly, sell, lend, give away, exhibit, or offer to sell, lend, give away or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or ac-

counts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

O.R.C. § 2905.371

Sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any newspaper, magazine, or other publication which is entered as second class matter by the post-office department. This immunity shall not apply to any newspaper, magazine, or other publication which is obscene. A newspaper, magazine, or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.



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In the

Supreme Court of the United States

October Term 1966

No. 260

I. M. AMUSEMENT CORP.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

Now comes the State of Ohio, Respondent herein, by Melvin G. Rueger, Prosecuting Attorney of Hamilton County, Ohio, and Calvin W. Prem, Assistant Prosecuting Attorney of Hamilton County, Ohio, and respectfully moves this Court for an order dismissing the within appeal for the reasons that:

(a) the appeal does not present a substantial federal question.

(b) the judgment rests upon an adequate non-federal basis.

OPINIONS OF THE COURTS BELOW

The Petitioner's brief correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The Petitioner's appeal, from the judgment of the Supreme Court of Ohio, challenges its conviction for violation

of *Section 2905.34 of the Revised Code of Ohio* under the provisions of the First, Fifth and Sixth Amendments to the Constitution of the United States of America.

QUESTIONS PRESENTED

The Petitioner submits the following five (5) questions in support of its Petition for Writ of Certiorari:

(1) Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and falling within the contemporary community standard as not appealing to prurient interest?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on any alleged obscene aspect of the motion picture in question or pandering by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity, charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the

part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

(4) Does Ohio's statutory definition of obscenity (O. R. C. 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States?

(5) On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

A. Preliminary Statement.

The I. M. Amusement Corporation, an Ohio corporation engaged in the business of operating a motion picture theater, known as "Imperial Follies", in Cincinnati, Ohio, was indicted by the Grand Jury of Hamilton County, Ohio, and charged with a violation of *Section 2905.34, Revised Code of Ohio* (exhibiting an obscene motion picture film).

A plea in abatement, motion to dismiss the indictment, and other preliminary matters were thoroughly argued and briefed, and were ruled upon by the trial court, prior to the time of arraignment.

Counsel for I. M. Amusement Corporation was permitted to enter his (corporate) client's appearance and plea of "not guilty" at the arraignment, and was further permitted to state his client's election to be tried by the trial court without a jury.

Upon conclusion of the case, the trial court determined that the motion picture film fell within the statutory definition of "obscenity" and found the defendant (Petitioner) to be guilty as charged.

On appeal to the Ohio First District Court of Appeals, the judgment of conviction was affirmed and, on appeal to the Supreme Court of Ohio, the matter was dismissed sua sponte on the ground that there was no substantial constitutional question.

B. Statement of Fact:

The I. M. Amusement Corporation, an Ohio corporation, operated a motion picture theater, known as "Imperial Follies", at 282 and 284 West McMicken Avenue, Cincinnati, Ohio.

On several dates prior to June 12 and 13, 1963, Mr. William Berger, an officer of said corporation, employed in a managerial capacity in the operation of its theater business, advertised the showing of a film, called "Beautease Models", at said theater. The said advertisements appeared in a newspaper of general circulation in the Cincinnati area. "Beautease Models" is another name for the film "Artists' Models", which film was admitted into evidence in the trial of the within case.

Cincinnati police officers, who were assigned to the Vice Control Bureau, went to the Imperial Follies Theater on June 12 and 13, 1963, paid admissions and viewed the film, "Artists' Models", being projected upon the screen. Other persons were in the theater viewing said motion picture at the same time. The police officers confiscated the film and charged I. M. Amusement Corporation with exhibiting an obscene motion picture film in violation of *Section 2905.34 of the Revised Code of Ohio.*

A trial by jury was waived and the trial court, after

hearing the evidence and testimony, and after viewing the motion picture film in its entirety, returned a verdict of "guilty as charged.". At the conclusion of the State's case, the defense called one witness and attempted to qualify him as an expert on the subjects of "obscenity" and "community standards." He failed to qualify and stated no opinion. As a practical appraisal, there was no defense presented.

ARGUMENT

QUESTION ONE: Whether the moving picture film in question is protected by the First Amendment?

Is is suggested and argued by the Petitioner that the motion picture film in question is not utterly without redeeming social value; that it is not patently offensive; and that it follows within the contemporary standards of the community; and does not appeal to prurient interests. Petitioner's counsel has indicated that he "has seen to it that the entire reel of the film in question * * * has been forwarded to the Court for its inspection" and, in fact, requests that the most naive clerk view the film and determine the question of its obscenity.

While the Respondent is in no way endeavoring to thwart or suppress the Court's (and/or the naive clerk's) opportunity to view the film, it is respectfully submitted that a trial de novo at this late date, and in this Court, is not in keeping with the intent and purpose of certiorari.

Section 2905.34 of the Revised Code of Ohio provides, in part, that:

> "No person shall * * * exhibit * * * an obscene, lewd, lascivious * * * motion picture film * * *."

The applicable test for defining obscenity, as existing and applied by the trial court at the time of trial, was the law of

Roth v. *United States*, 354 U. S. 476. In accordance with that test, a motion picture film is obscene when:

> "* * * to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

The Ohio Legislature codified this (Roth case) test for obscenity in *Section 2905.371 of the Revised Code of Ohio.* That section provides, in part, as follows:

> "* * * a newspaper, magazine or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

That determination (whether the film is, in fact, obscene) is a question of fact. And, since the Petitioner chose not to be tried by a jury, the trial judge was called upon to perform the duties of a jury and resolve that issue from the evidence presented and in accordance with the applicable law.

The Petitioner does not suggest, in his argument, that the trial judge was not acquainted with the law, or that the trial judge was unfamiliar with, or was incapable of ascertaining, the contemporary community standards, the dominant theme of the motion picture film he viewed in the court room, or its appeal to the average person. The "average person" in the community, necessary for a proper application of the test for obscenity, means that all persons must be taken into consideration. Not just adults. Not just a play-director with two years' experience in the "Playhouse in the Park", (a summertime stage operated in a Cincinnati park). It means all persons—men, women, children, young persons, the aged, the prudish, the immature, the ignorant, the highly educated, the scientific, the worldly

wise, the normal, the abnormal and, in short, all persons from every walk and standard of life.

Petitioner's counsel devotes considerable space to his personal appraisal of the film's context by pointing out that in his opinion there is no total nudity, no erotic dances, no simulation of sexual acts, etc. These observations, or appraisals, on his part do not affect or alter the legal procedural requirement which places the responsibility for determining the issue in a criminal case upon the trier of the facts. In the trial of Petitioner's case, that duty was in the trial judge.

The case of *Redrup* v. *State of New York*, 384 U. S. 916 (decided May 8, 1967), and several other cases are cited by the Petitioner in support of its effort to persuade this Court that it should super-impose its judgment upon that of the trial court and make a determination that the specific motion picture film herein involved should be included within the protection of the First Amendment; that this Court should now make a finding that "Artists' Models" or "Beautease Models" is not obscene as a matter of law.

Justice Brennan (dissenting), at page 448 in *Kingsley Book, Inc.* v. *Brown*, 354 U.S. 436, 77 S. Ct. 1325, stated:

> "A statute which does not afford the Defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. (Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i. e., that reasonable men may differ whether the material is obscene)."

And, Justice Learned Hand expressed the same view in *United States* v. *Kennerley*, 209 Fed. 119, 120, as follows:

> "The Court's only power is to decide whether the book

> is so clearly innocent that the jury should not pass upon it at all * * * The same question arises as would arise upon motion to direct a verdict at the close of the case * * * The question here is, therefore, whether the jury might find the book obscene under proper instructions."

It is repectfully submitted that this is the true approach, and true meaning, to what might be called "Constitutional Judgment". In the trial and conclusion to the Petitioner's case, there was sufficient evidence for the trial court to find that the motion picture film came within the prohibition of law.

QUESTION TWO: Whether the absence and/or preclusion of "expert" opinion testimony, on the aspect of obscenity denied Petitioner due process of law and a fair trial.

Although the Petitioner has raised this point as a second question in support of the Petition for Writ of Certiorari, it appears, from the argument submitted, to be merely an extension of the position taken under (its) Question One.

There is no contest to Petitioner's citation of *Friedman* v. *Maryland,* 85 S. Ct. 784, 380 U.S. 51, and which should be correctly cited as *Freeman* v. *Maryland,* and the legal proposition that "First the burden of proving that the film was unprotected expression must rest on the censor." The presumption of innocence, and the burden upon the prosecution to prove its case, in the trial of every criminal case, makes such citation academic. It is claimed that the prosecution merely identified the seized movie, and then rested; and that this then shifted the burden to the defense (to prove the protected qualities of the film). That contention, by the Petitioner, is erroneous.

The prosecution presented evidence of the facts and circumstances leading up to the arrest of the Petitioner, and seizure of the film. The film was identified and was admitted into evidence as an exhibit. Thereafter, the film was projected upon a screen and viewed by the trial judge. It seems elementary to suggest that the trial judge's viewing of such an exhibit would be the only way to apply the law (the test for obscenity) before making a determination of the issues involved in the case.

The Petitioner's premise here is that, in a criminal prosecution for obscenity, the prosecution should be required to present some sort of expert, or opinion, testimony to enlighten the trial judge (or jury) upon the subjects of contemporary community standards and appeal to prurient interests during the trial of the case in chief. That premise is not supported by law, the citation of Justice Frankfurter's comment in *Smith* v. *California,* notwithstanding. Justice Frankfurter's remarks suggest that enlightenment on the subject of moral community standards might be had through *qualified* experts (emphasis added), but that the determination of obscenity rests with the judge or jury. Justice Frankfurter's comment does not establish a requirement that "experts" must be used. (The trial court's exclusion of opinion testimony from the only defense witness called by the Petitioner was based upon his failure to qualify as an "expert" on the subject, or in the field, intended.)

The same argument that the Petitioner makes here was made and rejected in *Kahm* v. *United States,* 300 F. (2d) 78, 84, certiorari denied, 82 S. Ct. 949 (1962). In his opinion, Judge Pope stated:

> "Appellant contends that the Government made no case for the jury because no witnesses were called to testify or give their opinions as to whether the mailed

> material here in question would come within the definition of obscene material stated in *Roth*. The argument is that merely introducing proof that the material was mailed, proving its contents and that such contents were known to the appellant, was not enough. It seems to be appellant's theory that some qualified witness must be produced to furnish expert testimony as to the effect this material would have upon the average person, applying contemporary community standards, and whether to such person this material would have an appeal to prurient interest. It is argued that without that proof and proof as to what were the contemporary community standards there was no case for the jury."

In answering this, Judge Pope said:

> "We do not suggest that such testimony would not have been appropriate or admissible, or that the appellant, if he chose to do so, could not have offered evidence upon the same subject * * * *"

However, as to the claim that the prosecutor was *required* to enlighten the jury during his case in chief, the Court said:

> "It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the *Roth* case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists, or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present."

The Petitioner was given a fair trial. A jury having been waived, it became the duty and responsibility of the trial judge to determine the questions of obscenity and the Petitioner's guilt or innocence of the crime charged. There was no denial of due process of law.

QUESTION THREE: Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

The question, as above stated, has been repeated verbatim from Petitioner's brief and, in doing so, Respondent represents to this Court that the question itself is not founded upon the facts established at the trial of the case. The contention made, that there was no showing that the Petitioner's managerial agents had knowledge even of the existence of the film in question, is erroneous. The question presented, however, deals with scienter which Respondent concedes is a necessary ingredient for responsibility to the proscriptions of criminal laws pertaining to obscenity. (It is noted that the Petitioner has, apparently, abandoned its previously made challenge to a corporate entity's responsibilities under criminal laws.)

As evidenced by the record of the trial, the Petitioner's corporate existence was established by introduction of its Articles of Incorporation. It was stipulated that William Berger was employed by the Petitioner in a managerial

capacity and, further, that he was an officer of the corporation. Evidence was adduced that the Petitioner was licensed by the City of Cincinnati to engage in the motion picture theater business at 282 West McMicken Avenue, in said city (the same address in which the subject film was being shown on the date of the offense). The applications for the licenses issued to Petitioner were made by William Berger, Secretary-Treasurer. It was further stipulated that Mr. Berger, as one of Petitioner's officers and employed in a managerial capacity, advertised the showing of the film in question by placing advertisements in a local newspaper. The ads themselves were admitted into evidence without objection. At the time of the offense, the Petitioner's theater was open to the general public and in full operation through several of its employees. The film was shown, and was viewed by the arresting officers, on two dates — June 12, 1963 and on June 13, 1963. The defense, at the trial, established nothing to the contrary.

In light of the above facts established at the trial, it is respectfully submitted that Petitioner's claim of a failure of proof (of scienter) is totally without substance.

As cited by the Petitioner, the case of *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, clearly reflects the law on the subject. At page 154, this Court stated:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents* or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard Law Review 1. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness

> testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents.* The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

And, at page 161, Justice Frankfurter, addressing himself to a bookseller's refusal to face the facts, stated:

> "No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut."

See also *Rosen* v. *United States,* 161 U.S. 606 (1896).

When considering the evidence in this case, it is submitted that it was sufficient to establish the ingredient of scienter. Evidence of a similar nature was found sufficient to support a finding of scienter in *United States* v. *Samuel R. Hochman,* 277 F. (2d) 631 (1960), *certiorari denied,* 364 U.S. 837, 81 S. Ct. 70, (October 10, 1960), *rehearing denied,* 364 U.S. 906, 81 S. Ct. 231 (November 21, 1960). See also, *U. S.* v. *Roy A. Oakley,* 290 F. (2d) 517 (1961), *certiorari denied,* 368 U.S. 888, 82 S. Ct. 139, *rehearing denied,* 368 U.S. 936, 82 S. Ct. 358; *Harold S. Kahm* v. *United States,* 300 F. (2d) 78 (1962), *certiorari denied,* 369 U.S. 859, 82 S. Ct. 949.

QUESTION FOUR: Does Ohio's statutory definition of obscenity (O.R.C. 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States?

In 1961 the Ohio Legislature acted to incorporate into *Section 2905.371, of the Revised Code of Ohio,* the definition of "obscene" which was approved by the majority

opinion in the *Roth-Alberts* case. That section of the Ohio Revised Code reads, in part, as follows:

> "* * * * A * * * * * publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

That section, and its definition, applies to the word "obscene" used in *Section 2905.34, of the Revised Code of Ohio,* under which the Petitioner was prosecuted.

The Petitioner now claims that, because of the language cited from this Court's per curiam opinion in *Redrup* v. *New York,* decided May 8, 1967, the constitutional test of the *Roth* case has been invalidated. It is argued that additional elements have been added as a result of the various cases cited on page 20 of Petitioner's brief. It is observed that the decisions reached in many of the cases cited (*Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 82 S. Ct. 1676; *Grove Press, Inc.* v. *Gerstein,* 378 U.S. 577, 84 S. Ct. 1903), as well as many additional cases not cited, reflect a common disagreement between the various justices.

It is a basic postulate of our case law system that the decision of a majority determines the result, and an "opinion of the court" expresses the reasoning agreed upon by that majority. Where a majority agree upon the result, but do not agree upon the reasoning for the result, there is no "opinion of the court" even though the controversy is ended between the litigant parties.

The decision and the reasoning found in the "opinion of the court" determine the precedent value of any particular case. It is submitted that in many obscenity cases there have been no "opinions of the court"; the majority having agreed *only* upon the result, but not upon the supporting reasoning.

In *Wambaugh, The Study of Cases* (Second Edition, 1894) at page 50, the text states:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially * * * * 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision.' "

And in *Black, Handbook of Judicial Precedent* (1912), page 135-136:

> "If all or a majority of the judges concur in the result * * * * but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

It is respectfully submitted that the no clear majority decisions, and the separate pronouncements of the individual justices in their individual opinions, in the cases cited by the Petitioner, indicate no intent on the part of this Court to depart from the express holdings of the *Roth* case and its definition of "obscene".

In *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, Justice Brennan expressed reaffirmance of *Roth,* and Justice Goldberg concurred (page 1680). At page 1685, Chief Justice Warren, who was joined by Justice Clark, said:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the Roth case * * * *"

Justice Harlan adhered to his view of separate tests for state and federal cases by stating, at page 1686, of his opinion in *Manual Enterprises, Inc.* v. *Day*:

> "As to the States, I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat sex in a fundamentally offensive manner, under rationally established criteria for judging such materials * * * *"

Justice White concurred in the judgment and did not indicate his views, but voted with Justices Warren, Clark and Harlan to deny certiorari in *Grove Press, Inc.* v. *Gerstein* (*supra*) and *Tralins* v. *Gerstein* which used the *Roth-Alberts* standards.

It is respectfully submitted that the *Roth* test has not been invalidated or amended by the decisions of any of the cases cited; and that Ohio's statutory definition is in no way violative of the provisions of the First Amendment to the Constitution of the United States.

QUESTION FIVE: On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

The Respondent respectfully submits that the answer to Petitioner's fifth question is, likewise, "no". It is contended, by the Petitioner, that its rights under the First and Fourteenth Amendments were violated by reason of the Ohio Supreme Court's dismissal of the appeal to that court on the basis of no substantial constitutional question; and that the Ohio Supreme Court should have viewed the film and made its own determination concerning "com-

munity standards and obscenity" as against "constitutional protection."

The Petitioner has claimed "constitutional protection", under the First Amendment in the various motions argued prior to, during and after the trial, and in each of the appellate courts of the state. In each instance, and upon full consideration of the arguments presented, as well as the law, that claim was denied.

It is respectfully submitted that the issue, on appeal, is a limited one. The pre-*Roth* precedents, as well as the *Roth* test (by its very definition) pose the matter as being a question of fact for determination by a jury (or, as in this case, the trial court by reason of the Petitioner's waiver of a jury).

In *United States* v. *Kennerly*, 209 F. 119, Judge Learned Hand made it abundantly clear that the determination of obscenity was fundamentally a jury question. He drew an analogy to the jury question and standard of care in negligence cases. He expressed this opinion again in *United States* v. *Levine*, 83 F. (2d) 156 (cited by this Court in *Roth* as being consistent with the obscenity law in the *Roth* decision). Only if the publication could not, by any reasonable judgment, be held to come within the prohibition of the law, then it becomes the duty of the (trial) court to pass upon it as a matter of law. *United States* v. *Journal Co.*, 197 F. 415. The (trial) court, on demurrer, was required to decide whether the publication was so clearly innocent that a jury should not pass upon it at all. *United States* v. *Klauder*, 240 F. 501. But, where reasonable minds might fairly reach different conclusions as to the character of the publication, the determination of "obscene" becomes a question of fact. Where the trial is by a jury, their determination must be preceded by proper instruction.

The Petitioner, however, waived its right to a trial by

jury and elected, instead, to have the trial judge perform that (the jury's) function. Accordingly, the trial judge was placed in a dual role, but he was governed by the same principles of law. In his role as "trier of the facts" it was his duty, as would have been the jury's, to apply the law (the test) to the facts presented.

The Seventh Amendment to the Constitution of the United States provides that:

> "* * * * The right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law".

This Court stated, in *Chicago B. & O. R. Co.* v. *Chicago*, 166 U.S. 226, 17 S. Ct. 581, that:

> "It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state."

It appears that the first voice to sound a seemingly different rule was that of Justice Harlan in his concurring opinion in *Roth-Alberts*. Without citation, Justice Harlan expressed his "constitutional judgment" review in the following language:

> "If 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind * * * * In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based."

This, no doubt, was the forerunner of the quote from *Jacobellis* v. *Ohio* (cited by Petitioner on page 21 of its brief). Yet, in that same case Justice Harlan stated:

> "The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accomodation between the public interest sought to be served by obscenity laws * * * * and protection of genuine rights of free speech.
>
> * * * * As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."

Jacobellis was a no-majority decision (there was no opinion of the court). See also *Grove Press, Inc.* v. *Gerstein,* 378 U.S. 577, 84 S. Ct. 1909; *Tralins* v. *Gerstein,* 378 U.S. 576, 84 S. Ct. 1903; *California* v. *Williamson,* 377 U.S. 994, 84 S. Ct. 1902; and *Fried* v. *New York,* 378 U.S. 578, 84 S. Ct. 1904. (It is to be noted that Justice Brennan voted to deny certiorari in the *Williamson* case, which involved a criminal trial, but voted to grant certiorari in the *Grove Press* case, a civil proceeding.)

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari, filed herein, has not presented any substantial federal question; that the judgment rests upon an adequate non-federal basis; and that the within appeal should be dismissed.

Respectfully submitted,

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Ass't Prosecuting Attorney
Counsel for Respondent

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No. 260

In the

Supreme Court of the United States

October Term 1967

L. M. AMUSEMENT CORP.,
Appellant,

v.

STATE OF OHIO,
Appellee.

APPELLANT'S REPLY TO RESPONDENT'S MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

This reply is occasioned solely by deviations from the record engaged in by the appellee. The appellant in its original jurisdictional statement has largely anticipated the appellee's contentions in its motion to Dismiss the Appeal and will not reassert argument.

The appellee, however, has indicated aspects of the record which simply do not exist, and these should not be left uncorrected. Indeed the assumptions are typical of the assumptive, a priori, anti-intellectual and prejudicial exemptions from both prosecutory adduced actual adduction of evidence of evil intent and defensive opportunity for proof of good faith that have come to mark Ohio proceedings in the field of obscenity law.

CORRECTED STATEMENT OF FACT

On page 4 of Appellee's brief there appears the following statement: " 'Beautease Models' is another name of the film 'Artist Models,' which film was admitted into evidence in the trial of the within cause."

There is absolutely not a scintilla of evidence in the entire record to support this presumption of the prosecutor. It is merely an assumption he makes. He can afford to. In obscenity cases in Ohio the prosecution is virtually exonerated from any extrinsic proof of pandering purpose.

On page 5 of appellee's motion this bland statement is offered by the appellee, re the defense expert witness: ". . . At the conclusion of the State's case, the defense called one witness, and attempted to qualify him as an expert on the subjects of 'obscenity' or 'community standards.' He failed to qualify and stated no opinion . . ." The Court is asked to refer to page 47 to 56 of the record, for a deliberate misstatement has been made to it. The Defense offered and qualified an expert witness, *without any objection to individual qualification* by the Prosecution. Indeed on page 55 of the Record, the prosecution admitted individual qualification while objecting to any right of the defense to being an expert witness at all. This argumentative position they repeat in their memorandum in their response to Argument 2, belying their presently deliberately misleading statement to this court.

The arrant reshuffling of facts continues even into the argument. On page 12 it is stated: "It was further stipulated that Mr. Berger, as one of Petitioner's officers and employed in a managerial capacity, advertised the *showing of the film in question* by placing advertisements in a local newspaper." (Emphasis added). No such stipulation was made. It was stipulated that Mr. Berger placed an ad-

vertisement on behalf of the defendant but no admission was made that the advertisement was for the showing of the film in question. On that issue the prosecutor failed to offer any proof whatsoever, save its own assumptions to this date. So immersed is the prosecution in the Ohio concept that sexuality in and of itself constitutes prima facie proof of both obscenity and ergo pandering intent, that the simplest attributes of connective proof are and have been consistently ignored in this record. Indeed even corporate operation had to be reopened to prosecution proof following motion to dismiss. (See Record—page 34).

Respectfully submitted,

ALLEN BROWN,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

I. M. AMUSEMENT CORP. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 260. Decided January 15, 1968.

PER CURIAM.

The judgment of the Supreme Court of Ohio is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE concurs on the ground that evidence of contemporary community standards was excluded at trial.

MR. JUSTICE HARLAN would affirm for the reasons set forth in his separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496, 500–503, and in his dissenting opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455.